Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Request of	)	
	)	
CORR WIRELESS COMMUNICATIONS, LLC	)	WC Docket No. 05-337
	)	
For Review of a Competitive Eligible Telecommunications Carrier High-Cost Support Decision of the Universal Service Administrative Company	))))	CC Docket No. 96-45

REPLY COMMENTS OF RURAL CELLULAR ASSOCIATION IN SUPPORT OF REQUEST FOR REVIEW

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SUMMARY

The Commission's *Verizon Wireless/ALLTEL* ("*VZW-ALLTEL*") *Order* provides no support for USAC's decision to reduce the March 2008 cap baseline by the phased-down amounts. The *VZW-ALLTEL Order* makes it clear that the merger condition was adopted so as to limit the amount of support paid to ***the merged entity***, not to its competitors. VZW's departure as a CETC in any state, whether it be through a five-year phase down or through its immediate withdrawal as a CETC (as it has in Washington, Oregon and New Hampshire, for example), does not affect the amount that any state is entitled to receive under the *Interim Cap Order*. In fact, nothing in the *VZW/ALLTEL Order* alters anything set forth in the *Interim Cap Order*. Furthermore, as indicated by the majority of commenters, even if the *Verizon/ALLTEL Order* could be read as adopting Verizon's "understanding" that the phased-down support would be excluded from the cap baseline, doing so would violate the APA because it would mean the cap mechanism was changed in a non-universal service-related proceeding without notice or opportunity for comment by affected parties.

VZW and Sprint claim that competitors will receive a "windfall" if the March 2008 cap baseline remains constant as support to VZW and Sprint is phased down. Their argument is based on the erroneous proposition that the interim cap somehow entitles them to have their competitors' support slashed by a fixed percentage over time. That is not how the cap operates. Under the cap mechanism, CETCs are entitled to a lesser reduction, and increased support, if total CETC support within a state decreases. This does not change by virtue of VZW's relinquishment of support. Rather than being "transferred" from VZW to its competitors, VZW's support is being returned to the USF. Competitors are merely seeking to receive the amount to which they are entitled under the *Interim Cap Order*.

VZW committed to forgo its high-cost support in an *ex parte* presentation to the Commissioners during the Sunshine period. Consequently, the Commission was prohibited from even considering VZW's *ex parte* commitment in the disposition of the merger applications and the petitions to deny. The Commission's actions denying the petitions and granting the applications, subject to the condition that VZW/ALLTEL phase down its CETC high-cost support, violated § 309(d)(2) of the Act, as well as the Rules, and was unenforceable by USAC.

RCA respectfully suggests that VZW should not be heard to speculate as to what "should have been apparent to Corr" after VZW concluded its last-minute, off-the-record and undisclosed arrangement with the Commission. Corr had the right to assume that the Commission would not unlawfully depart from its formally-adopted *Interim Cap Order* rule and the universal service policy it served. Corr also had the due process right to notice and the opportunity to be heard if it was to be deprived of the level of funding to which it was entitled under the *Interim Cap Order*. It was the Commission's duty to provide explicit notice that CETC high-cost support was to be reduced below its March 2008 level — if that was its intention. The text of *VZW-ALLTEL* provided no such notice. Hence, Corr is allowed to collaterally attack the condition imposed in *VZW-ALLTEL*.

USAC's administrative authority is limited to implementing clear Commission rules. If it needed any guidance, USAC was obliged to seek it from the Commission, not from a CETC with an interest in ensuring that its ill-advised *ex parte* commitment to forgo high-cost support would not result in an alleged "windfall" to its competitors. It is particularly disturbing that USAC would proceed to issue a decision favorable to VZW on February 25, 2009, after working with VZW for six weeks to implement VZW's view of the merger condition. When it became obvious that other CETCs did not share VZW's self-serving understanding of the *VZW-ALLTEL* condition, USAC should have recused itself entirely and referred Corr's January 27, 2009 letter to the Commission. That USAC issued a decision under these circumstances evidences a misunderstanding of the limits placed on its authority by § 54.702 of the Rules.

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REPLY COMMENTS OF RURAL CELLULAR ASSOCIATION SUPPORTING REQUEST FOR REVIEW

Rural Cellular Association ("RCA"), by its attorneys and pursuant to the Commission's Public Notice, DA 09-805, released April 9, 2009, hereby submits its reply comments in support of the request of Corr Wireless Communications, LLC ("Corr") for review of a decision of the Universal Service Administrative Company ("USAC") misinterpreting the Commission's decisions in *High-Cost Universal Support,* 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*") and *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC,* 23 FCC Rcd 17444 (2008) ("*VZW-ALLTEL*").[1]

I. INTRODUCTION

The majority of the commenters in the initial round of comments strongly support Corr's position that USAC exceeded its authority and acted arbitrarily in excluding Verizon Wireless's phased-down support from the March 2008 cap baseline. Commenters supporting Corr's request for review include individual competitive ETCs ("CETCs") and associations representing wireless companies that invest high-cost support to advance universal service in rural America. All of these commenters correctly argued that USAC lacked the authority to interpret the *VZW-*

[1] *See* Appeal from Decision of Administrator of High Cost Universal Service Fund, CC Docket No. 96-45 (Mar. 25, 2009).

ALLTEL merger condition as reducing the cap amounts established in the *Interim Cap Order*. Further, these commenters agreed that *VZW-ALLTEL* made only passing reference to Verizon's "understanding" that the phased-down support would not increase support to its competitors and did not actually adopt any such provision. These commenters also noted that, even if *VZW-ALLTEL* could be read as adopting Verizon's "understanding," such an action would violate the Administrative Procedure Act ("APA") by impermissibly changing the CETC cap rule in the course of a merger proceeding without proper notice to affected parties.

Unsurprisingly, the only parties opposing Corr's request were the companies that stand to gain from USAC's interpretation, Verizon Wireless ("VZW") and Sprint Nextel Corporation ("Sprint"). These companies ignore the fact that the phase-down condition in the *VZW/ALLTEL Order* was intended to limit support to the merged entity, not to further reduce support to its CETC competitors. VZW and Sprint also argue, incorrectly, that the *Interim Cap Order* entitles them to have their competitors' support reduced by a fixed percentage in perpetuity – regardless of whether the absolute amounts established in the *Interim Cap Order* are actually exceeded. VZW and Sprint have it exactly backwards in that they are the ones who will receive a windfall if the support they are voluntarily giving up is simultaneously taken away from their competitors.

II. DISCUSSION

A. USAC's Decision to Exclude the Phase-Down Amounts from the CETC Cap Finds No Support in the Verizon/ALLTEL Order.

The majority of commenters correctly note that the *Verizon/ALLTEL Order* provides no support for USAC's decision to reduce the March 2008 cap baseline by the phased-down amounts.[2] Furthermore, most commenters recognized that, even if *Verizon/ALLTEL* could be read as adopting Verizon's "understanding" that the phased-down support would be excluded from the cap baseline, doing so would violate the APA because it would mean the cap mechanism was changed in a non-universal service-related proceeding without notice or opportunity for comment by affected parties.[3]

VZW's relinquishment of CETC status in any state, whether it be through a five-year phase down or through its immediate withdrawal as a CETC (as it has in Washington, Oregon and New Hampshire, for example), does not affect the amount that any state is entitled to receive under the *Interim Cap Order*. In fact, nothing in *VZW/ALLTEL* alters anything set forth in the *Interim Cap Order*.

VZW and Sprint incorrectly suggest that the *VZW/ALLTEL* merger conditions contemplated further reductions in CETC support beyond the levels specified in the *Interim Cap Order*. In fact, *VZW-ALLTEL* makes it clear that the merger condition was adopted so as to limit the amount of support provided to ***the merged entity***, not to its competitors. Sprint misleadingly argues that the FCC "expressed its ongoing concern about 'the explosive growth in high-cost universal service support disbursements to competitive ETCs.'"[4] But this statement was made in the FCC's description of the history of the CETC cap, not in its discussion of the reasons for the VZW/ALLTEL phase-down. In the paragraph adopting the merger condition itself, the Commission could not have been more emphatic:

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[2] *See* Cellcom Companies' Comments at pp. 3-6; RTG Comments at p. 4; SouthernLINC Comments at pp. 4-5; USA Coalition Comments at p. 6; Verizon/ALLTEL Management Trust Comments at p. 4.

[3] *See* Cellcom Companies' Comments at p.6; RTG Comments at p. 4; Pine Belt Comments at pp. 3-4; SouthernLINC Comments at p. 9; USA Coalition Comments at pp. 5-6; Verizon/ALLTEL Management Trust Comments at pp. 4-5.

[4] Sprint Comments at p. 2.

> The proposed transaction constitutes a merger of ***the largest wireless company in the United States***, based on revenues, as well as the number of retail customers, with another wireless company that is ***the largest recipient of the high-cost competitive ETC support. Such unique facts and large scope of this transaction*** compel us to condition our approval of the proposed transaction on Verizon Wireless's commitment to phase down its competitive ETC high cost support over five years, as discussed herein.[5]

Clearly, the FCC was concerned with the prospect of a merged entity that would be both larger than any other wireless company in the U.S. and would receive more high-cost support than any other CETC. The five-year phase-down in VZW/ALLTEL's support addressed those concerns. Imposing a further reduction on other CETCs' capped support would have contributed nothing to addressing those concerns; indeed, it would exacerbate them by further impairing competitors who already must face a larger post-merger rival. In sum, the phase-down merger condition was imposed as a counterweight to VZW/ALLTEL's disproportionate market power. *VZW-ALLTEL* did not adopt Verizon's preference that other CETCs' support be reduced beyond the levels set forth in the *Interim Cap Order*.

B. Allegations that Corr is Seeking a "Windfall" Are Disingenuous.

VZW and Sprint claim that competitors will receive a "windfall" if the March 2008 cap baseline remains constant as support to VZW and Sprint is phased down.[6] Their argument is based on the erroneous proposition that the interim cap somehow entitles them to have their competitors' support slashed by a fixed percentage over time. That is not how the cap operates.

The *Interim Cap Order* capped the high-cost support that CETCs in each state can receive at "twelve times the level of support that all [CETCs] were eligible to receive in that state for the month of March 2008."[7] Accordingly, where current uncapped support within a state

[5] *VZW-ALLTEL*, 23 FCC Rcd at 17532 (emphasis added, footnotes omitted).

[6] *See* VZW Comments at p. 6; Sprint Comments at p. 4.

[7] *Interim Cap Order,* 23 FCC Rcd at 8850.

would exceed the March 2008 baseline for that state, the cap reduction factor is determined by dividing the March 2008 baseline amount by the total uncapped support figure. The resulting percentage is then applied to each CETC's uncapped support to yield the amount to be disbursed.

Under the *Interim Cap Order*, the percentage reduction in a given state will change with the levels of (uncapped) support in each successive period. Subsequent increases in total CETC support within a state will result in a steeper reduction percentage. The entry of a new CETC after March 2008 would likely create an especially steep reduction factor, as in fact has been the case in states such as North Carolina (64% reduction as of February 2009), New York (47%), Tennessee (72%), New Hampshire (87%), New Mexico (37%), and Alabama (56%).

The withdrawal of a CETC has the opposite effect, reducing total CETC support to a level below the amount that all CETCs in that state – including the now-withdrawn carrier – were eligible to receive in March 2008. This scenario has, in fact, occurred in Oklahoma, where Dobson Cellular Systems, Inc. and American Cellular Corporation relinquished their ETC status in late 2008 after being acquired by AT&T, Inc., with a resulting cap reduction of zero percent as of February 2009. Should other CETCs in Oklahoma grow in subsequent months, their support would increase proportionately as well, until such time as the cap is reached.

Given that the March 2008 cap baseline, and not the percentage reduction, is fixed by the interim cap mechanism, it is disingenuous for VZW and Sprint to argue that Corr and other competitors are seeking a "windfall." Under the cap mechanism, CETCs are entitled to a lesser reduction, and increased support, if total CETC support within a state decreases. This does not change by virtue of VZW's relinquishment of support. Rather than being "transferred" from VZW to its competitors, VZW's support is being returned to the USF. Competitors are merely seeking to receive the amount to which they are entitled under the *Interim Cap Order*. Indeed, VZW will be the one to receive a windfall if, after voluntarily giving up support in order to gain approval of a merger, a corresponding reduction is then made to the pool of support previously secured to its competitors by FCC order.

C. The Commission Could Not Lawfully Reduce CETC High-Cost Support Pursuant to an Ex Parte Presentation during the Sunshine Period of a Restricted Adjudicative Proceeding

VZW contends that the imposition of the phase-down condition in *VZW-ALLTEL* reflects "the formally adopted policy of the full Commission."[8] It also contends that the policy rationale behind the imposition of the condition was to effect a "reduction in high cost support payments."[9] Finally, VZW claims that nothing in the *Interim Cap Order* "preclude[d] the Commission from limiting, in a subsequent order, high-cost funds available to CETCs."[10] VZW's first contention is incorrect; its second is probably correct; and its claim may be true, technically speaking. However, the Commission was precluded from limiting CETC high-cost support through the imposition of the phase-down condition in *VZW-ALLTEL* by federal administrative law as set forth in the APA, §§ 254, 303(r) and 309(d) of the Communications Act of 1934, as amended ("Act"), as well as §§ 1.945(c), 1.1203(a), 1.1204(c)(10) and 1.1208 of the Commission's Rules ("Rules").

The rule the Commission adopted by its *Interim Cap Order* was to "cap" CETC high-cost support in each state at its March 2008 level. The word "cap" is defined as "a maximum limit, as one set by law or agreement on ... spending ... during a certain period of time; ceiling."[11] Because it placed a short-term ceiling on CETC high-cost support funding by a notice-and-

[8] VZW Comments at p. 6.

[9] *Id.*

[10] VZW Comments at p. 6.

[11] Random House Webster's Unabridged Dictionary 308 (2d ed. 2001).

comment rulemaking proceeding, the Commission had to employ a notice-and-comment rulemaking that comported with § 533 of the APA and § 254(a) of the Act, if it wanted to reduce the level of CETC high-cost support payments below its March 2008 level over a five-year period.[12]

Moreover, the Commission had to issue a decision that presented a reasoned explanation for its change in policy that provided assurance that the change would preserve and advance universal service and was based on a consideration of the statutory universal service principles. *See* 47 U.S.C. § 254(b). Obviously, the policy of reducing CETC high-cost support below its March 2008 level over a five-year period was not formally adopted by the Commission, as required by the APA and the Act.

VZW recognizes that the level of its own CETC high-cost support post-merger was at issue in the *VZW-ALLTEL* adjudication.[13] The issue was raised formally in several petitions to deny that were filed in accordance with § 309(d)(1) of the Act.[14] VZW committed to forgo its high-cost support in an *ex parte* presentation made to the Commission during the Sunshine period.[15] VZW's commitment was unverified. It did not appear in the VZW-ALLTEL merger applications, the pleadings filed, or the public record, and it was not subject to official notice.[16]

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[12] *See* RCA Comments at pp. 13-14.

[13] *See* VZW Comments at p. 2 & nn.5-7.

[14] *See* RCA Comments at pp. 2-3.

[15] *See id.* at pp. 3-4.

[16] The Commission can take official notice of facts within its area of expertise as long as the parties to the proceeding have an adequate opportunity to respond. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) (citing *National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775 (1978)). *See also* 2 K. Davis & R. Pierce, *Administrative Law Treatise* § 10.6, at 150-51 (3rd ed. 1994); C. Koch, *Administrative Law and Practice* § 5.55[2], at 208 (2nd ed. 1997). VZW's commitment was made *ex parte* during the Sunshine period when the petitioners were prohibited from responding even if they were aware of VZW's *ex parte* presentation. *See* 47 C.F.R. § 1.1203(a).

Consequently, the Commission was prohibited from even considering VZW's *ex parte* commitment in the disposition of the merger applications and the petitions to deny. *See* 47 U.S.C. § 309(d)(2). The Commission's actions denying the petitions and granting the applications, subject to the condition that VZW/ALLTEL phase down its CETC high-cost support, violated § 309(d)(2) of the Act, as well as the Rules,[17] and was unenforceable by USAC.

D. Corr's Request Is Not an Untimely Collateral Attack on VZW-ALLTEL

Unknown by the public, VZW made its *ex parte* commitment to the Commission the day before *VZW-ALLTEL* was adopted. When issued, *VZW-ALLTEL* did not even address, much less expressly confirm, VZW's "understanding" that its *ex parte* commitment would not result in an increase in high-cost support to other CETCs. And the Commission did not discuss whether the imposition of the condition in *VZW-ALLTEL* would have any impact on the *Interim Cap Order* rule, Corr's interests, or the protected rights of any other CETC. Yet, VZW has the temerity to argue that Corr should have sought reconsideration of *VZW-ALLTEL* and that its appeal is an untimely collateral attack on that order.[18]

RCA respectfully suggests that VZW should not be heard to speculate as to what "should have been apparent to Corr" after VZW concluded its last-minute, off-the-record and undisclosed

[17] The Rules permit the Commission to grant a non-auctionable application over a petition to deny and without a hearing based on findings "from an examination of such application and supporting data, any pleading filed, or other matters which it may take official notice." 47 C.F.R. § 1.945(c). By considering VZW's *ex parte* commitment in its decision-making process, the Commission violated § 1.945(c) by consenting to the VZW-ALLTEL merger by making a finding from its examination of a matter that was not in the applications, or in any of the pleadings filed, and that was not subject to official notice. The Commission was guilty of violating the "rudimentary principle that that agencies are bound to adhere to their own rules and procedures." *Achernar Broadcasting Co. v. FCC,* 62 F.3d 1441, 1447 (D.C. Cir. 1995). "Simply stated, rules are rules and fidelity to the rules that have been properly promulgated ... is required of those to whom Congress has entrusted the regulatory missions of modern life." *Reuters Ltd. v. FCC,* 781 F.2d 946, 951 (D.C. Cir. 1986).

[18] *See* VZW Comments at p. 7.

arrangement with the Commission.[19] Like the parties to the VZW-ALLTEL proceeding, Corr was entitled to rely on the "presumption of regularity" that attaches to the Commission's licensing actions.[20] Corr had the right to assume that the Commission would not unlawfully depart from its formally-adopted *Interim Cap Order* rule and the universal service policy it served. Corr also had the due process right to notice and the opportunity to be heard if it was to be deprived of the level of funding to which it was entitled under the *Interim Cap Order.*[21] And it was the Commission's duty to provide explicit notice that CETC high-cost support was to be reduced below its March 2008 level — if that was its intention. The text of *VZW-ALLTEL* provided no such notice. Under these circumstances, Corr was not on notice that its interests were at stake and that it should seek reconsideration of *VZW-ALLTEL.*

Parties can challenge the substantive validity of a Commission rule or regulation in an adjudicatory action to enforce the rule or regulation.[22] Thus, even if the Commission intended that the condition it imposed on VZW/ALLTEL would reduce the high-cost support provided other CETCs that were not parties to *VZW-ALLTEL,* Corr can challenge the substantive validity of the *VZW-ALLTEL* "rule" in response to USAC's attempt to enforce the "rule" by reducing its high-cost support. Hence, Corr is allowed to collaterally attack the condition imposed in *VZW-ALLTEL.*

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[19] *Id.*

[20] *See, e.g., KCST-TV, Inc. v. FCC*, 699 F.2d 1185, (D.C. Cir. 1983).

[21] *See* RCA Comments at p. 16.

[22] *See Functional Music, Inc. v. FCC,* 274 F.2d 543, 546 (D.C. Cir. 1958), *cert denied,* 361 U.S. 813 (1959).

E. VZW Has Disclosed that USAC Is Exceeding Its Authority

VZW made the disconcerting revelation that it has been "work[ing] with USAC to implement the merger condition" since its merger with ALLTEL closed on January 9, 2009.[23] USAC's administrative authority is limited to implementing clear Commission rules.[24] If it needed any guidance, USAC was obliged to seek it from the Commission, not from a CETC with an interest in ensuring that its ill-advised *ex parte* commitment to forgo high-cost support would not result in an alleged "windfall" to its competitors.[25]

It is particularly disturbing that USAC would proceed to issue a decision favorable to VZW on February 25, 2009, after working with VZW for six weeks to implement VZW's view of the merger condition. When it became obvious that other CETCs did not share VZW's self-serving understanding of the *VZW-ALLTEL* condition, USAC should have recused itself entirely and referred Corr's January 27, 2009 letter to the Commission.[26] That USAC issued a decision under these circumstances evidences a misunderstanding of the limits placed on its authority by § 54.702 of the Rules.

F. CETCs Are Directly and Substantially Harmed by USAC's Decision to Exclude the Step-Down Support From the March 2008 Cap Baseline.

VZW attempts to paint a silver lining around the cloud of unlawfully reduced CETC cap support by arguing that "their share will no longer be diluted by any line growth Verizon Wireless (or Sprint) may experience."[27] But VZW's eventual departure as a CETC does not

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[23] VZW Comments at p. 3.

[24] *See* RCA Comments at p. 7.

[25] VZW Comments at p. 7.

[26] *See* RCA Comments at Ex. 3.

[27] VZW Comments at p. 8.

somehow spare other CETCs from an adverse cap impact. VZW's line growth would only be an issue if the March 2008 cap baseline were not reduced by the amount of phased-down support. Because USAC is reducing the cap baseline, the effect of the remaining CETCs' increased line counts and support is magnified: with a smaller numerator (i.e., March 2008 cap baseline excluding VZW phase-down amounts) in the equation, any increase in the denominator (i.e., the remaining CETCs' uncapped support) has a disproportionate effect on the resulting reduction factor.

Accordingly, VZW's claim of a silver lining resulting from the absence of VZW line growth has no basis in fact.

III. CONCLUSION

For all of the reasons set forth above, RCA supports Corr's request for review. Considering that CETCs are being denied the high-cost support to which they are entitled under the *Interim Cap Order* rule, RCA respectfully requests that the Commission issue a final order granting Corr the relief it requests by June 9, 2009. *See* 47 C.F.R. § 54.724(b).

Respectfully submitted,

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